No. 83-747

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Petitioner,

v.

PAUL D. JOHNSON, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

William F. Mulroney
(Counsel of Record)

James M. Hanny
2000 L Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 783-6400
Attorneys for Respondents

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

QUESTION PRESENTED

Whether a general contractor obtains an employer's immunity from actions for negligence under §5(a) of the Longshoremen's and Harbor Worker's Compensation Act by injured employees of the general contractor's subcontractors, when the general contractor has secured workers' compensation coverage for all its subcontractors under a "wrap-up" insurance plan.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the Petition for Writ of Certiorari to review the unanimous decision of the United States Court of Appeals For the District of Columbia Circuit in this matter.

OPINIONS BELOW

The decisions of the United States District Court for the District of Columbia, not officially reported, appear as Petitioner's Appendices A-G. The decision of the District Court denying plaintiffs' motions for post judgment relief

under Fed. R. Civ. P. 59(e) and 60(b)(3), not officially reported, appear as Petitioner's Appendices H-L. The decision of the United States Court of Appeals for the District of Columbia Circuit, not yet officially reported, appears as Petitioner's Appendix M. The orders of the Court of Appeals denying a Petition for Rehearing and a Suggestion for Rehearing En Banc, not officially reported, appear as Petitioner's Appendices N and O. The Court of Appeals' Order staying issuance of its mandate to November 7, 1983 pending the filing of a petition for a writ of certiorari, not officially reported, appears as Petitioner's Appendix P.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1254(1). Respondents agree with the applicability of that provision. Respondents further agree that the Petition has been timely filed under Rule 11 of the Rules of this Court and pursuant to 28 U.S.C. §2101(c).

RELEVANT STATUTES

Respondents agree that the relevant statutory provisions include the following, set forth by petitioners:

District of Columbia Code §36-501.
United States Code Title 33, §§904(a) and (b) and 905(a).

Respondents also cite:

United States Code Title 33, §932(a).
United States Code Title 33, §933(a).
United States Code Title 33, §934.

United States Code Title 33, §935.
United States Code Title 33, §936.
United States Code Title 33, §938.

Section 80 of the Washington Metropolitan Area Transit Authority Interstate Compact (Pub. L. No. 89-774, 80 Stat. 1324 (1966)).

Respondents do not agree that other provisions cited by petitioners are relevant to the issues presented.

STATEMENT OF THE CASE

A. Introduction

The sole issue in these seven cases, consolidated for appeal by the United States Court of Appeals for the District of Columbia Circuit, is whether a general contractor, ordinarily considered a third party for purposes of suit by injured employees of subcontractors under the Longshoremen's and Harbor Workers' Compensation Act, becomes an immunized employer under 33 U.S.C. §905(a) where the general contractor provides compensation coverage for all its subcontractors on a project under a so-called wrap-up insurance program. The heart of petitioner's argument is that because it set in place the wrap-up insurance plan to cover all its subcontractors, it is entitled to the "quid pro quo" immunity that the statute provides for employers who comply with the statutory obligation of employers to secure compensation coverage for their employees. 33 U.S.C. §§904 and 905(a). At the trial level five judges agreed that immunity should convey to the party that pays for it, and granted petitioner's motions for summary judgment. The lower court decisions, however, in adopting petitioner's rationale, either implied or stated openly that under the unique circumstances herein, the actual em-

ployers were not immune from suit because these employers did not secure their own compensation insurance while the Washington Metropolitan Area Transit Authority (WMATA), normally a third party subject to suits for negligence, became the immunized employer by virtue of his providing compensation coverage to its subcontractors. *See* Petitioner's Appendices B at 11a, footnote 2, and C at 17a-18a. The Court of Appeals for the District of Columbia reversed, holding that WMATA was under no legal duty to institute the wrap-up plan, and thus WMATA was not entitled to the immunity of an employer under 33 U.S.C. §905(a). The Court declined to express an opinion as to whether the subcontractor-employers had "secured" compensation insurance under §904(a) under the wrap-up plan (Decision at 20, footnote 16). But, it should be noted at the outset that the only appellate case law in the District of Columbia on that issue stands for the proposition that WMATA's subcontractor-employers have secured compensation insurance for their employees by participating in petitioner's wrap-up plan and are thus entitled to §905(a) quid pro quo immunity from suit. *Edwards et al. v. Bechtel Associates Professional Corp., D.C., et al.* (D.C. decided August 31, 1983), petition for certiorari denied Nov. 28, 1983. Respondent's Appendix A.

B. WMATA and the Wrap-Up Plan

What is termed Phase I of WMATA's subway construction project commenced on December 9, 1969 was the beginning of construction. On all WMATA construction contracts entered into from that time up until July 30, 1971, WMATA's contractors secured their own workers' compensation insurance. Phase II of WMATA's subway construction commenced on July 30, 1971 with the introduction of the Coordinated Insurance Program (wrap-

up insurance). WMATA selected Lumberman's Mutual Casualty Company, a Kemper subsidiary, to provide the system wide insurance for all contractors engaged in subway construction. Another Kemper subsidiary, National Loss Control Service Corporation, was engaged to adjust all compensation and liability claims and also to provide certain jobsite monitoring services. The inauguration of the wrap-up plan coincided with the selection of the Bechtel Corporation as the system wide engineering and safety consultant to WMATA for all subway construction contracts entered into after July 30, 1971.

SUMMARY OF ARGUMENT

This petition should be denied for a number of reasons. Petitioner's Presentation of the Questions Presented herein fundamentally misstates the immunity conferred by §905(a) of the Longshoremen's and Harbor Workers' Compensation Act. All the prevailing cases interpreting the LHWCA unanimously hold that a general contractor is a third party subject to a suit for negligence under 33 U.S.C. §933(a) by an injured employee of a subcontractor. *Probst v. Southern Stevedoring Company,* 379 F.2d 763 (5th Cir. 1967); *DiNicola v. George Hyman Construction Co.,* 407 A.2d 670 (D.C. 1979); *Miller v. Northside Danzi Construction Co. et al.,* 629 P.2d 1389 (Alaska 181); *Fiore v. Royal Painting Company, Inc.,* 398 So.2d 863 (Fla.App. 1981); *Thomas v. George Hyman Construction Co.,* 173 F.Supp. 381 (D.D.C. 1959). The United States Court of Appeals for the District of Columbia has, in the decision below, reaffirmed what every appellate court that has considered the question posed herein has held: the statute imposes a legal duty to secure compensation on employers primarily and on general contractors only secondarily. Petitioner therefore cannot claim the im-

munity of an employer simply by imposing the nature of the insurance arrangement for any given construction project. The only relevant legal status asserted by the petitioner is that of general contractor, and its injection of the word "builder," not included in its arguments below, is irrelevant.

The petitioner cannot point to any conflict in the Circuit Court decisions on this issue. It instead asks this Court to overrule every legal precedent in existence and to award it immunity in exchange for making a purely business decision. Granting a petition for this purpose would work untold damage to principles of "stare decisis" and would only encourage a substantial increase in future petitions for certiorari.

The Petitioner's reliance on the New York statutory scheme is misplaced, since under New York case law a general contractor is a third party subject to suit by employees of its subcontractors.

The Court of Appeals decision does not necessarily inhibit the future operation of wrap-up insurance. The Court did not opine on whether the subcontractor-employers have secured compensation insurance, which is the only real novel issue arising out of this scenario. It is plain that to comport completely with statutory requirements all WMATA must do is require its subcontractors to participate in the payment of the premiums for the insurance coverage.

The result reached below is not unmanageable, as argued by the Petitioner. Section 80 of the Washington Metropolitan Area Transit Authority Interstate Compact, Pub. L. No. 89-774, 80 Stat. 1324 (1966) clearly and unreservedly renounces any and all immunities the petitioner may have under the laws of the District of Colum-

bia, Maryland and Virginia for proprietary functions. The state workmen's compensation statutes of Maryland and Virginia do not apply to WMATA because Section 80, as federal law, is superior and preempts any claim of immunity under those state statutes. Further, the LHWCA's provisions apply to all of WMATA's subway projects because of the many jurisdictional contacts with the District of Columbia, and that compensation statute's third party provisions will apply. In any event, these issues are not before this Court, and will be raised at the trial level in due course.

Finally, WMATA's arguments, sprinkled liberally with "facts" not contained in the record, attempt to prophesy a mountain of potential litigation if this Court does not reinterpret §§904 and 905(a) to the liking of the petitioner. The arguments are absurd as there has been relatively little WMATA subway construction since 1980 and the statute of limitations is of course a bar to stale claims.

Therefore, the arguments of the petitioner are completely without merit and the petition must be denied.

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Questions Presented For This Court's Consideration By The Petitioner Contain Fundamental Misstatements Of The Applicable Immunities Conferred By §§904 And 905(a).

With regard to the Petitioner's first question presented, three fundamental misstatements of law appear: first, there is absolutely no legal obligation contained anywhere in the WMATA Compact requiring it to provide workers' compensation benefits for the contractors it contracts with

to perform construction work on WMATA's subway project. Thus WMATA's initiation of the wrap-up plan in 1971 was not, as Petitioner presents to this Court, "pursuant to its obligation under a federally-approved interstate Compact . . . ." Secondly, the LHWCA does not, as stated by petitioner, immunize contractors on a project, but rather only the employer of the injured worker who happens, on a construction job, to be a contractor. All other contractors on the same job, including the general contractors, are third parties and are potentially liable for damages to the injured worker for tortious conduct that proximately causes the worker's injuries. *Probst v. Southern Stevedoring Company, supra; DiNicola v. George Hyman Construction Company, supra; Miller v. Northside Danzi Construction Company, et al., supra; Fiore v. Royal Painting Company, Inc., supra; Thomas v. George Hyman Construction Company, supra.*

Finally, petitioner states that the United States Court of Appeals below has held that injured workers on WMATA's subway project are receiving compensation benefits from WMATA by virtue of the wrap-up plan in effect. In fact the Court avoided deciding that issue, leaving open the question of whether WMATA's subcontractors have secured the compensation coverage for their employees. Decision at 20, footnote 16. If the subcontractors have so complied, then the benefits are deemed to flow from the insurance carrier on behalf of the subcontractors, not the petitioner herein. The District of Columbia Court of Appeals has recently held just that in the case of *Edwards et al. v. Bechtel Associates Professional Corp., D.C., et al., supra* (App. A.). Thus, the only appellate decision on this point holds that wrap-up insurance satisfies a subcontractor's obligation to secure compensation under §904(a), entitling it to the employer immunity the statute anticipates.

Petitioner herein, as a general contractor, remains a potentially liable third party. *DiNicola v. George Hyman Construction Co., supra.*

With regard to the Petitioner's second question presented, respondents submit that the question misstates the immunity of the "builder," a question that is irrelevant in this context anyway since the petitioner's claim to immunity below was based on its status as "general contractor." There is not a single decision granting immunity to a builder under the LHWCA, and the builder, be he an owner (see *Lindler v. District of Columbia,* 502 F.2d 495 (D.C. Cir. 1974)) or a general contractor (see *DiNicola v. George Hyman Construction Company, supra*), remains a third party subject to suit under the Act. Thus the "builder" forfeits no immunity by purchasing workers' compensation protection for its contractors since it never had it. A builder, like a general contractor, cannot forfeit an immunity it never had. Neither can it obtain immunity it ordinarily does not have merely by arranging to purchase compensation insurance for its contractors.

II. The Circuit Court Decisions Are In Total Harmony That a General Contractor Is A Third Party Under §933(a) Vis A Vis An Injured Employee Of A Subcontractor.

All the appellate Courts that have considered the question have held that only the employer-subcontractor has the legal obligation to secure compensation insurance for his employees, and only it is entitled to the "quid pro quo" immunity from suit that the statue envisions. *Probst v. Southern Stevedoring Company, supra; DiNicola v. George Hyman Construction Company, supra; Miller v. Northside Danzi Construction Company et al., supra;*

Fiore v. Royal Painting Company, Inc., supra; Thomas v. George Hyman Construction Company, supra.

Prior to the start of the wrap-up insurance on July 30, 1971, WMATA must admit that it was without any claim to statutory immunity. With the institution of the wrap-up plan, WMATA informed prospective builders not to include the cost of insurance in their bids since all coverage would be provided by WMATA. Petitioner claims, in a nutshell, that this business decision, made for financial and administrative reasons, gives it as an incidental benefit, immunity from suit. This is because it was the "general contractor" for the project, and all the contractors with whom it contracts are "subcontractors" within the meaning of §904(b). The United States Court of Appeals for the District of Columbia below has only restated the unanimous interpretation of §904(b) by the Fifth Circuit Court of Appeals in *Probst v. Southern Stevedoring Company, Inc.* and The District of Columbia Court of Appeals in *DiNicola v. George Hyman Construction Co., supra,* in rejecting this self-serving proposition. Since the employer-subcontractor has the primary duty to secure compensation coverage for its employees under §904, only it is entitled to the "quid pro quo" immunity for securing the compensation coverage. WMATA, by preempting the subcontractors' primary legal duty beginning in 1971, does not thereby become inheritor of the subcontractor's statutory immunity. That is just plain common sense, and that is the only holding of the Court below.

It is to be noted that the Court did not decide the only novel issue tangentially involved herein, that is, whether the subcontractors retain their immunity by participating in WMATA's Coordinated Insurance Program. The only appellate opinion on this issue holds that the subcontractors do retain their immunity under WMATA's wrap-up

plan. *Edwards, et al. v. Bechtel Associates Professional Corp., D.C., et al., supra,* (Appendix A). Thus, at the present time the Courts' holdings leave the parties in the precise situation they were in under Phase I (pre wrap-up) of the WMATA subway construction project. This being the case, there is hardly any reason for granting the Petition for Certiorari.

III. Petitioner's Remaining Arguments Have No Merit.

A. WMATA's Wrap-Up Plan Has Not Been Declared Void.

The Court's decision below only states that WMATA has pre-empted its contractor's primary statutory duty and that the wrap-up plan "deviates" from the requirements of the statute. It is clear, however, that WMATA may select the carrier that its bidders must do business with. All that is legally required to fully comply with the statute is that the contractors, and not WMATA, pay the premium for this insurance. Surely this can be done if the Petitioner wishes to comply fully with the requirements of the law.

B. New York Law Does Not Immunize A General Contractor From Suit By Employees Of Subcontractors.

Contrary to the unstated implications of Petitioner's Brief, a general contractor is not entitled to immunity from suit by an injured employee of a subcontractor under the New York Workmen's Compensation Law. *Sweezey v. Arc Electrical Construction Co.*, 295 N.Y. 306, 67 N.E.2d 369 (1946). Petitioner's reliance on the intent of the architects of the New York Law regarding immunity is thus refuted by that state's case law, and is misplaced.

C. Petitioner's Argument That The Result Is Unmanageable Is Meritless.

WMATA contends that the result of the Court below could lead to thousands of lawsuits. This argument, irrelevant in any case, is simply meritless. Few WMATA projects have been under construction since 1980, and the statute of limitations has long since run on most accidents even where negligence could have been involved. The figures cited by the petition do not appear in the record on appeal and were mentioned for the first time in Petitioner's Motion For Rehearing and Suggestion For Rehearing En Banc, before the Court below. The petition should not be granted based on such doomsday arguments.

D. The Remaining Legal Issues Should Be Decided By The Trial Court.

Petitioner suggests that the result below will create anomalous results. However, the argument is conclusory and WMATA presumes its forthcoming motions before the trial court below will be resolved in its favor. It is by no means certain that the laws of Maryland and Virginia will immunize the petitioner from negligence suits by employees of subcontractors for accidents occurring in those jurisdictions. Choice of law, rules, the absolute waiver of immunity contained in §80 of the Compact, and the interpretation of the Maryland and Virginia statutes are all issues that will shortly be dealt with by the trial court. The fact that there remain outstanding legal issues below does not constitute grounds for granting the petition.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the Petition for Certiorari should be denied.

Respectfully submitted,

ASHCRAFT & GEREL

William F. Mulroney

James M. Hanny
2000 L Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 783-6400

Attorneys for Respondents

APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 82-365 and 82-1078

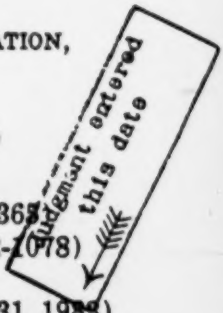
LYLE EDWARDS, ET AL. (No. 82-365),

and

DARWIN H. SMITH (No. 82-1078), APPELLANTS,

v.

BECHTEL ASSOCIATES PROFESSIONAL CORPORATION, D.C., ET AL., APPELLEES.



Appeal from the Superior Court of the District of Columbia

(Hon John F. Doyle, Trial Judge, No. 82-365)
(Hon. Carlisle E. Pratt, Trial Judge, No. 82-1078)

(Argued April 21, 1983 Decided August 31, 1983)

William F. Mulroney, with whom *James M. Hanny* and *Michelle A. Parfitt* were on the briefs, for appellants.

James W. Greene, with whom *Gary W. Brown* and *Catherine H. Lesica* were on the briefs, for appellees.

Before NEBEKER, BELSON, and TERRY, *Associate Judges*.

NEBEKER, *Associate Judge*: This consolidated appeal arises out of third-party negligence actions initiated in the Superior Court of the District of Columbia by appellants against Bechtel Associates Professional Corporation

("Bechtel"). In both cases, the trial court granted Bechtel's motion for summary judgment and these appeals followed. Because the six-month period for bringing the actions under the Longshoremen's and Harbor Workers' Act expired, we affirm.

I.

Appellant Lyle Edwards was an underground superintendent for Ball-Healy-Granite, a contractor for the Washington Metropolitan Area Transit Authority's ("WMATA") construction of the Metro subway system. He began his work in August 1976. At all pertinent times, Bechtel was the safety engineering consultant to WMATA at its construction sites.

In 1978, Edwards received a medical report from his physician stating that his exposure to underground dusts and fumes had worsened a lung condition. Subsequently, in January 1979, appellant filed a worker's compensation claim with his employer. On April 1, 1980, a compensation award was entered. Thereafter, on April 27, 1981, appellant brought this third-party negligence action against Bechtel alleging that Bechtel had failed to provide a safe and healthy working environment.

Appellant Darwin Smith was an Assistant General Superintendent with the Joint Venture, Fruin-Colnon, a contractor working on the Bethesda Metro station for WMATA. As noted above, Bechtel was the safety and engineering consultant to WMATA. Smith began his work in May 1978.

In November 1978, Smith received a medical report from his physician noting that he had contracted a serious respiratory illness through his exposure to toxic dust and fumes on the contract site. Subsequently, he filed a worker's compensation claim with his employer, and then

received a formal award of compensation on May 20, 1980. Thereafter, on November 17, 1981, he brought this third-party negligence suit against Bechtel, alleging that Bechtel had failed to provide a safe and healthy working environment.

In both of these cases, the trial court granted appellees' motion for summary judgment because the six-month period for bringing the third-party negligence action had elapsed.[1]

II.

Appellants assert that the trial court erred when it held that § 933 of the Longshoremen's and Harbor Workers' Act ("the Act")[2] barred them from asserting a third-party claim against appellees, and assigned all their rights thereunder to their respective employers. Appellants raise several issues. We address each in turn.[3]

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[1] Section 933 of the Longshoremen's and Harbor Workers' Act (33 U.S.C. § 901 *et seq.* (1976)) states in pertinent part:

> (b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or [Benefits Review] Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

[2] *See* note 1, *supra*.

[3] One claim, which we hold does not merit substantive discussion, is that appellants' failure to timely bring their negligence actions is excused by the fact that the compensation carrier failed to disclose the existence of dangerous worksite conditions. This argument is meritless. In fact, any duty owed runs to the named insured (the employer) and not individual claimants.

A.

Initially, appellants argue that their respective employers did not "secure" compensation insurance within the meaning of the statute[4] (*see* § 904(a) of the Act), so as to allow them the benefit of assignment of the employees' right to sue. Appellants note that their employers may now pursue third-party actions as reimbursement for their losses[5] without having secured the compensation insurance which pays over benefits to injured employees. While we agree that there is an implied statutory *quid pro quo* between securing compensation insurance and assignment to an employer of the right to sue, we believe that appellants' employers did "secure" compensation insurance within the meaning of the statute. Notwithstanding that WMATA paid for the insurance, appellants' employers did secure the compensation payments under the terms of their contracts with WMATA. Further, compensation claims were made with appellants' employers and against their named policies. We are satisfied, therefore, that the statutory requirement has been met.[6]

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[4] Section 904(a) states in pertinent part:

> Every employer shall be liable for and shall *secure* the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment. (Emphasis added.)

[5] *See* § 933(b) of the Act.

[6] Neither do we believe that WMATA violated statutory dictate through the purchase of umbrella insurance coverage for all of its subcontractors.

B.

Appellants preface their next contention by asserting that the Supreme Court decision in *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596 (1981), is not binding upon our court.[7] This is plainly not the case. *See Dodson v. Washington Automotive Co.*, 461 A.2d 1020 (D.C. 1983). We therefore must be guided by the restraints on third-party actions established in *Rodriguez*.

In this light, appellants' central contention is that a "unique" conflict of interest exists, sufficient to make out an exception to the requirements of § 933. Specifically, appellants urge that there is a disincentive for their employers to pursue their right to sue, where both Bechtel and their employers are bound by WMATA to subscribe to the same insurance program offered by the Lumbermen's Mutual Casualty Company. Therein, appellants argue that the running of the six-month period does not bar a third-party suit in the circumstance where a conflict of interest creates such a disincentive for the employer to sue. We disagree.

In *Rodriguez*, *supra*, the Supreme Court interpreted § 933(b) in light of its legislative history and successive amendments, and concluded that the six-month period following an award is "both mandatory and unequivocal." *Rodriguez v. Compass Shipping Co.*, *supra*, 451 U.S. at 602. We therefore hold that the trial court did not err

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[7] Appellants argue that *Rodriguez's* holding, which rejected conflicts of interest as a basis for preventing assignment of the right to sue from employee to employer, does not apply where the claimant is not a longshoreman. This is a strained and erroneous reading of *Rodriguez*, which we specifically rejected in *Dodson v. Washington Automotive Co.*, *supra*, 461 A.2d at 1024.

in relying upon *Rodriguez* when it granted appellees' motion for summary judgment. Once the compensation awards had been entered for appellants and the six-month grace period had passed, appellants' right to bring a third-party action was transferred automatically to their employers completely divesting appellants of their right to sue. This is so regardless of the asserted existence of a conflict of interest. *See Rodriguez, supra.*

C.

Finally, appellants ask that we limit the application of *Rodriguez* to prospective cases only. Noting that appellants both waited in excess of one year after receiving their formal compensation award to bring these actions, we decline to so hold. *See generally Mendes v. Johnson*, 389 A.2d 781 (D.C. 1978) (en banc).

Affirmed.